91-1187

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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN EDWARD HOOPER,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT
AND
ALABAMA COURT OF CRIMINAL APPEALS

APPENDIX TO PETITION FOR WRIT
OF CERTIORARI

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THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1989-90

(Released March 30, 1990)

3 Div. 91

John Edward Hooper

v

State

Appeal from Escambia Circuit Court
CC-85-62

BOWEN, JUDGE

John Edward Hooper was convicted of two counts of second degree rape and was sentenced to five years' imprisonment on each conviction. Although Hooper raises nine issues in this appeal from his convictions, we need address only two.

Hooper was originally tried and convicted of these crimes in September 1985. His convictions were subsequently reversed

because the prosecutor had asked improper questions of character witnesses on cross-examination. Hooper v. State, 523 So.2d 469 (Ala.Crim.App. 1986). Hooper was retried and was again convicted in September 1988. Prior to his second trial, the prosecutrix, Hooper's daughter, recanted her allegations.[1] She also refused to testify against Hooper at the retrial. It is undisputed that before the second trial the State was aware that she had recanted her stories and would not testify against him.

The prosecutrix was the first witness to testify at the retrial. At the request of the State and over Hooper's objection, she was called as the court's witness and, in response to specific questions posed by the court,

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[1] The prosecutrix had intially made a complaint against Hooper in January 1985, at which time she was 13 years old. It appears from the record that, beginning the month after making her complaint, she has periodically recanted her story.

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COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING
MONTGOMERY, ALABAMA

3 DIV 91

John Edward Hooper

v.

State of Alabama

You are hereby notified that on May 17, 1991, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing overruled. Rule 39(k) motion denied. No opinion.

Lane W. Mann, Clerk
Alabama Court of
Criminal Appeals

lg

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

August 23, 1991

1901381

Ex parte John Hooper

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: John Edward Hooper v. State)

(CCA 3/91 (Escambia CC-85-62)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COSTS TAXED TO PETITIONER.

Steagall, J.-Hornsby, CJ., Shores, Adams and Ingram, JJ., concur.

Hooper contends, and we agree, that the trial court erred in giving the following instruction to the jury:

> "Now, the prior testimony of [the prosecutrix] given in September of 1985 while she was under oath and subject to cross-examination can be used by you as substantive evidence of the facts stated by her during her prior testimony to prove or disprove the innocence or guilt of the Defendant John Edward Hooper of the offenses alleged in the indictment."

This instruction was given at the State's request and in reliance on dicta contained in this court's opinion in Randolph v. State, 348 So.2d 858 (Ala.Crim.App.), cert. denied, 348 So.2d 867 (Ala. 1977).

Contrary to the dicta contained in Randolph, 348 So.2d at 866, the Alabama Supreme Court clearly stated in Lester v. Jacobs, 212 Ala. 614, 618, 103 So. 682, 686 (1925): "The general rule in this jurisdiction is that the testimony given on a former trial by a witness at the last trial in only

admissible, after a proper predicate, for the purpose of contradiction or impeachment; it is not competent as cumulative or original evidence." (Emphasis added.) Accord, Manning v. State, 217 Ala. 357, 359, 116 So. 360, 361 (1928) (testimony given at a preliminary hearing could have been introduced, "not as original evidence of fact, but for the purpose of testing the recollection of the witness, or for impeachment") (emphasis added); Porter v. Louisville & Nashville R.R., 202 Ala. 139, 142, 79 So. 605, 608 (1919) ("In no event could [the prior testimony] have been received as original evidence ..., nor do we assume that it was offered for that purpose") (emphasis added). Cf. Corona Coal & Iron Co. v. Callahan, 202 Ala. 649, 650, 81 So. 591, 592 (1919) (in suit for malicious prosecution, it was reversible error to admit testimony from the underlying trial as original evidence); E. E. Yarbrough Turpentine Co. v.

Taylor, 201 Ala. 434, 435, 78 So. 812, 813 (1918) (same); Thompson v. Richardson, 96 Ala. 488, 492, 11 So. 728, 729 (1892) (same). In the event a witness's inconsistent testimony from a prior trial is admitted, the jury should be clearly instructed that this testimony may be considered for impeachment purposes only and not as independent or original evidence. See Manning v. State, 217 Ala. at 359, 116 So. at 362; Kennedy v. State, 85 Ala. 326, 331, 5 So. 300, 301 (1888).

The rationale advanced by the Alabama courts for holding prior inconsistent statements, even those given as testimony in a prior proceeding, inadmissible as substantive evidence is that such statements are "purely hearsay." Corona Coal & Iron Co. v. Callahan, 202 Ala. at 650, 81So. at 592. Accord, Thompson v. Richardson, 96 Ala. at 492, 11 So. at 729 ("merest hearsay"). The Federal Rules of Evidence offer a different

view with regard to prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition." Fed.R.Evid. 801(d)(1)(A). Rule 801(d)(1)(A) provides that such a statement is not hearsay where made by a witness who testifies at the present trial and who is subject to cross-examination concerning the prior statement. Several states have adopted this federal rule or a version thereof. See generally 4 D. Louisell & C. Mueller, Federal Evidence §410 (1980 & Supp. 1989) (State Adoptions of Rule 801).

In Randolph v. State, 348 So.2d at 863-64, this court reversed the defendant's conviction because the trial court had failed to specifically instruct the jury that the prior inconsistent testimony of the State's primary witness, which had been offered for impeachment purposes, could not be considered

as substantive evidence. Through an opinion authored by the late Leigh M. Clark, Supernumerary Circuit Judge, we then went on to question the soundness of this aspect of Alabama law. We noted that there is "widespread dissatisfaction with the traditional rule," which is followed in Alabama, and that many judges and scholars "have pressed for repudiation of the rule that prior inconsistent statements of a non-party witness have no substantive consequence in a present trial." Gamble, Howard, & McElroy, The Turncoat of Chameleonic Witness: Use of His Prior Inconsistent Statement, 34 Ala.L.Rev. 1, 18 (1983) (footnotes omitted) (citing Randolph, 348 So.2d at 864). We also discussed Federal Rule 801(d)(1)(A) and the history of its adoption. Randolph, 348 So.2d at 865-66. Recognizing the incongruity in permitting a witness's prior testimony to be admitted as substantive evidence when the witness is

Alabama Supreme Court cases cited at the outset of this discussion have not been overruled or otherwise modified by that court.[4] This court is bound by the decisions of the Alabama Supreme Court, §12-3-16, Ala. Code (1975), and may not "overturn or change [those decisions] in any manner." Passmore v. State, 47 Ala.App. 189, 191, 252 So.2d 115, 116 (1971) (emphasis added). In light of those cases, we have no alternative to the conclusion that the trial court erred in instructing the jury that the prior inconsistent statement of the prosecutrix could be considered substantive evidence.

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[4] The Supreme Court denied the petition for writ of certiorari filed by the State in Randolph, without opinion or comment. Ex parte State ex rel. Attorney General, 348 So.2d 867 (Ala. 1977). The denial of a petition for writ of certiorari "does not necessarily indicate [the Supreme Court's] approval of all the language used or all of the legal conclusions contained in the opinion sought to be reviewed." Morrison v. Morrison, 287 Ala. 343, 251 So.2d 764, 765

II

Hooper asserts that the evidence was insufficient to sustain his convictions. In light of our discussion in Part I, above, we are constrained to agree.

In order to convict Hooper of second degree rape, the State had to prove that Hooper engaged in sexual intercourse with the prosecutrix while she was between the ages of 12 and 16. See §13A-6-62, Ala. Code (1975). As previously noted, the only evidence incriminating Hooper was the prosecutrix's prior inconsistent testimony and her prior inconsistent statements made to a school counselor, a social worker and three of her

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Accord, Ex parte Glasco, 513 So.2d 61 (Ala. 1987); Ex parte McDaniel, 418 So.2d 934, 935 (Ala. 1982). A "denial of certiorari should never be considered as an expression by the reviewing court on the merits of the controversy." Ex parte Buse, 549 So.2d 1344 (Ala. 1989). We certainly cannot construe the denial of the writ in Randolph as an implicit overruling of the Supreme Court cases cited earlier.

friends.[5] In fact, the only actual evidence that a crime had been committed was the prior inconsistent testimony and statements. The substantive evidence contained in this record is the prosecutrix's testimony that Hooper did not not commit the acts charged in the indictment. Under these facts, we must conclude that the evidence was insufficient to sustain the convictions.

Where an appellate court concludes that the evidence is insufficient to sustain a jury verdict, the Double Jeopardy Clause of the Fifth Amendment prohibits a retrial of the defendant on the same charge. Burks v. United

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[5] The extrajudicial statements to the counselor, social worker, and friends clearly were admissible only for impeachment purposes and not as substantive evidence. E.g., Ex parte Brown, 499 So.2d 787, 791 (Ala. 1986); Cloud v. Moon, 290 Ala. 33, 37, 273 So.2d 196, 199 (1973); Isbell v. State, 57 Ala.App. 444, 450, 329 So.2d 133, 138, cert. denied, 295 Ala. 407, 329 So.2d 140 (1976). The State does not contend otherwise.

States, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1 (1978). We are aware that the United States Supreme Court has also held that "the Double Jeopardy Clause allows a retrial where the reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted against the defendant, even where the court also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction. Lockhart v. Nelson, 488 U.S. _____, _____, 109 S.Ct. 285, 290, 102 L.Ed.2d 265 (1988)." Fortier v. State, [Ms. 6 Div. 776, Feb. 23, 1990] _____ So.2d _____, _____ (1990). However, we find Lockhart distinguishable from the case at bar.

In Lockhart, there was other evidence, aside from the inadmissible evidence, against the defendant. The defendant, Nelson, was given an enhanced sentence under an Arkansas statute which required the prosecutor to prove

beyond a reasonable doubt four prior felony convictions. The prosecutor introduced evidence of four prior convictions; however, one of these convic-tions had been pardoned by the governor, and was therefore null and void. Although Nelson stated at the sentencing hearing that he though the conviction had been pardoned, there was no actual objection to the introduction of the conviction. 488 U.S. at _____, 109 S.Ct. at 288. Therefore, the Court was able to conclude:

> "Permitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording him an opportunity to 'obtai[n] a fair readjudication of his guilt free from error.' Had the defendant offered that the conviction had become a nullity by reason of the pardon, the trial judge would presumably have allowed the prosecutor an opportunity to offer evidence of another prior conviction to support the habitual offender charge. Our holding today thus merely recreates the situation that would have been obtained if the trial court had excluded the

> evidence of the conviction because of the showing of a pardon." 488 U.S. at _____, 109 S.Ct. at 291 (citations omitted) (emphasis added).

In the case at bar, the only indication that Hooper had committed the crime with which he was charged (in fact, the only indication that a crime had been committed at all) was the prior inconsistent testimony of the prosecutrix. While this evidence was admissible for impeachment purposes, it was not admissible as substan-tive evidence and on this ground Hooper objected numerous times to its admission. Had the trial court properly excluded this evidence from consideration as substantive evidence, the State, in this particular rape trial, simply had no case. The substantive evidence contained in the record is the prosecutrix's testimony that there were no acts of sexual intercourse between her and Hooper.

Remanding a case for retrial under Lockhart "recognizes that the State may have additional evidence that it did not produce in reliance upon the strength of the errone-ously admitted evidence.... However, where it appears from the record that the State produced all available significant evidence at trial and the State does not suggest it has more, an appellate court should remand for the entry of a judgment of acquittal." State v. Baker, 228 N.J.Super. 135, 549 A.2d 62, 66 (1988). Cf. Isbell v. State, 57 Ala.App. 444, 450-51, 329 So.2d 133, 138, cert. denied, 295 Ala. 407, 329 So.2d 140 (1976) (where the only evidence incriminating to the defendant was the prior inconsistent statement of a prosecution witness, "a limiting instruction would not be appropriate, since the insufficiency of the evidence would not justify the case being submitted to the jury, unless it be submitted on the affirmative

charge requested by the defendant").

For the reasons stated above, the judgment of the Escambia Circuit Court is reversed and the cause remanded for the entry of a judgment of acquittal.

REVERSED AND REMANDED.

All Judges concur.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1990-91

(Released December 14, 1990)

89-1314

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: John Edward Hooper

v.

State)

Escambia Circuit Court
(CC-85-62)

MADDOX, JUSTICE.

The State asks us to overturn prior cases holding that testimony given under oath at a prior trial and subject to the penalty of perjury is admissible for the purpose of contradiction or impeachment but not as substantive evidence.

The Court of Criminal Appeals, noting that it was "bound by the decisions of [this Court]," held that it had "no alternative to the conclusion that the trial court erred in instructing the jury that the prior inconsistent statement of the prosecutrix could be considered substantive evidence."[1] We reverse and remand.

John Edward Hooper was initially convicted of two counts of second degree rape of his daughter. On his appeal of those convictions, the Court of Criminal Appeals reversed the convictions because the prosecutor

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[1] The issue was deliberately presented by the State, when, at the trial, the State, relying on dicta in Randolph v. State, 348 So.2d 858 (Ala.Cr.App.), cert. denied, 348 So.2d 867 (Ala. 1977), requested that the trial court instruct the jury that the testimony of the prosecutrix given in a prior trial, under oath and subject to cross-examination, could be used as substantive evidence of the facts stated in the testimony. See Hooper v. State, [Ms. 3 Div. 91, March 30, 1990] ____ So.2d ____ (Ala.Cr.App. 1990).

had asked improper questions of character witnesses.

The case was retried, and at the retrial, Hooper's daughter, the prosecutrix, recanted her story. The State questioned the daughter about her previous testimony and, thus, introduced into evidence all of her prior testimony concerning the alleged sexual abuse. The trial court, at the request of the State, specifically instructed the jury that it could consider that prior inconsis-tent testimony as substantive evidence upon which it could base a conviction.[2] The jury found Hooper guilty on

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[2] The trial judge gave the following instruction:

> "Now, the prior testimony of [the prosecutrix] given in September of 1985 while she was under oath and subject to cross-examination can be used by you as substantive evidence of the facts stated by her during her prior testimony to prove or disprove the innocence or guilt of the Defendant John Edward Hooper of the offenses alleged in the indictment."

both counts.

The Court of Criminal Appeals reversed Hooper's convictions, stating:

> "Contrary to the dicta contained in Randolph [v. State], 348 So.2d [858] at 866 [Ala.Cr.App. 1977], the Alabama Supreme Court clearly stated in Lester v. Jacobs, 212 Ala. 614, 618, 103 So. 682, 686 (1925): 'The general rule in this jurisdiction is that the testimony given on a former trial by a witness at the last trial is only admissible, after a proper predicate, for the purpose of contradiction or impeachment; it is not competent as cumulative or original evidence.' (Emphasis added). Accord, Manning v. State, 217 Ala. 357, 359, 116 So. 360, 361 (1928) (testimony given at a preliminary hearing could have been introduced, 'not as original evidence of fact, but for the purpose of testing the recollection of the witness, or for impeachment') (emphasis added); Porter v. Louisville & Nashville R.R., 202 Ala. 139, 142, 79 So. 695, 608 [sic] (1918) ('In no event could [the prior testimony] have been received as original evidence ..., nor do we assume that it was offered for that purpose') (emphasis added). Cf. Corona Coal & Iron Co. v. Callahan, 202 Ala. 649, 650, 81 So. 591, 592

> (1919) (in suit for malicious prosecution, it was reversible error to admit testimony from the underlying trial as original evidence); E. E. Yarbrough Turpentine Co. v. Taylor, 201 Ala. 434, 435, 78 So. 812, 813 (1918) (same); Thompson v. Richardson, 96 Ala. 488, 492, 11 So. 728, 729 (1892) (same). In the event a witness's inconsistent testi-mony may be considered for impeachment purposes only and not as independent or original evidence. See, Manning v. State, 217 Ala. at 359, 116 So. at 362; Kennedy v. State, 85 Ala. 326, 331, 5 So. 300, 301 (1888)."

Hooper v. State, _____ So. 2d at _____.

Even though the Court of Criminal Appeals applied the rule of evidence contained in these prior cases, that court, nevertheless, pointed out that the soundness of the rule had been questioned in Randolph v. State, 348 So.2d 858 (Ala.Cr.App. 1977), a case that was later described as documenting "wide-spread dissatisfaction with the traditional rule" and as citing cases and writings of many judges and scholars who "have

pressed for repudiation of the rule that prior inconsistent statements of a non-party witness have no substantive consequence in a present trial." Hooper v. State, ____ So.2d ____, quoting Gamble, Howard, & McElroy, The Turncoat or Chameleonic Witness: Use of His Prior Inconsistent Statement, 34 Ala.L.Rev. 1, 18 (1983), which also had cited Randolph.

It is apparent that the Court of Criminal Appeals felt constrained, and rightfully so, to follow this Court's earlier cases holding that prior inconsistent statements could never be used as substantive evidence.

The rule that this Court had previously set out is clear. The reason justifying that rule is that such evidence is "purely hearsay," but courts have found little difficulty in carving out exceptions to the hearsay rule in those many instances when the testimony, even though hearsay, is considered

to be credible enough to justify its presentation to a trier of fact.

It is clear to us that the modern trend is to allow a prior inconsistent state-ment to be used as substantive evidence, provided, of course, that the prior inconsis-tent statement was given under oath, was subject to the penalty of perjury, and was made at a trial, hearing, or other proceeding, or in a deposition. This modern trend is in line with Federal Rule of Evidence 801, which provides:

> "(d) Statements which are not hearsay. -- A statement is not hearsay if --
>
> "(1) Prior statement by witness. -- The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition...."

A number of states have adopted rules of evidence that include a rule substantially

similar to Rule 801(d)(1)(A), Fed.R.Evid.

Hooper suggests that this Court should not adopt such a rule of evidence but that if a rule similar to Rule 801(d)(1)(A) Fed.R.Evid., is desirable for Alabama, then the legislature is the proper body to adopt it. We find no limitation upon this Court's power to adopt the rule by Court decision, because this Court has broad powers to adopt rules of procedure. See Amendment 328, § 6.11, Constitution of Alabama, 1901. Other state supreme courts have by case law adopted rules similar to the federal rule. See State v. Almeda, 211 Conn. 441, 560 A.2d 389 (1989), and State v. Whelan, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994 (1986); Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982) (the Supreme Court of Georgia held that a prior inconsistent state-ment of a witness could be used as substan-tive evidence even though the prior statement was not made under

oath in a judicial proceeding or deposition, as the federal rule requires). The Georgia Supreme Court set forth some of the benefits from a rule allowing the use of prior inconsistent state-ments as substantive evidence:

> "We foresee these salutary effects:
>
> "(a) Once a declaration is made, both the State and the defense are accorded some measure of protection from the erratic or unpredictable witness, in that his declaration can be considered substantively where the witness appears and is subject to cross-examination, notwith-standing variant testimony from the stand.
>
> "(b) Similarly, both sides are assured a measure of protection against efforts to influence the testimony of a witness, as the prior declaration is no longer effectively revocable at the will of the witness.
>
> "(c) For the same considerations witnesses are protected from proper attempts to influence testimony--the potential gain from that impropriety being diminished

substantially by the adoption of this rule.

> "If, from all the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.' Judge Learned Hand, in DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925)."

248 Ga. at 864, 286 S.E.2d at 722 (emphasis original).

We should not be understood as expressing any view on the question of whether a prior inconsistent statement not made under oath can be used as substantive evidence when the declarant takes the stand and is subject to cross-examination. That question is not before us.

If this case had been tried in a federal court, it seems that the daughter's prior inconsistent statement would have been

admissible as substantive evidence under Rule 301(d)(1)(A), Fed.R.Evid. We think the federal rule is a good rule, that it does not substantially prejudice the rights of a defendant to a fair trial, and that it fosters a search for the truth.

We think that it is time that this Court changed our rule; therefore, after examining the record, considering the arguments of the parties, and reevaluating the rule against using prior inconsistent statements as substantive evidence, we hereby change that rule. We hold that a prior inconsistent statement of a witness who takes the stand and is available for cross-examination may be used as substantive evidence if the prior statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. All previous decisions of this Court to the contrary are hereby

overruled.

The judgment of the Court of Criminal Appeals is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hornsby, C.J., and Shores, Houston, and Steagall, JJ., concur.

Jones, Almon, and Adams, JJ., dissent.

ALMON, JUSTICE (dissenting).

If the defendant in fact committed the offenses for which he has been convicted, his conduct is most certainly both legally culpable and morally reprehensible. It is because of the emotional reaction that such acts engender, coupled with our natural zeal to protect children and to punish those who harm them, that courts must be especially careful to remain objective when presiding over or reviewing cases of this nature. The question before us, however, is whether the State has presented legal evidence that can be considered in determining whether the State has met its burden of proof beyond a reasonable doubt. If the earlier, now recanted, testimony is "substantive evidence," a case can be submitted to the jury on that testimony alone. The rule announced by the majority is not limited to sexual offenses and will apply to all criminal prosecutions, and,

for that matter, to all civil actions.

The rule prohibiting the use of prior inconsistent statements as substantive evidence, which the majority does away with in its opinion, has been a fundamental part of the accused's right to a fair trial for over 100 years. Because of the important constitutional aspects of the rule, I cannot agree with the majority's implication that it can be abolished as readily as a rule of procedure could be or as easily as a merely arbitrary rule of evidence. In addition, I do not agree that the now-abolished rule was based solely on the hearsay rule. It was also based on the accused's right to confront and thoroughly cross-examine witnesses against him, a right guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution and Art. I, § 7, of the Alabama Constitution. "While hearsay rules and the Confrontation Clause ... protect

similar values, it is quite a different thing to suggest ... that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." California v. Green, 399 U.S. 149, 155 (1970).

Cross-examination has been called "the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, A Treatise on the System of Evidence in Trials at Common Law, § 1367, at 29 (3d Ed. 1940). Cross-examination must be an adversarial proceeding to be effective. Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967). The goals of cross-examination are best achieved by questioning the witness at the time the statement is made, in the presence of the same trier of fact who must ultimately assess the witness's credibility. The principal virtue of cross-examination "is in its immediate application of the testing process. Its

strokes fall while the iron is hot." State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).

Under the change effected by the majority's opinion, the accused's opportunity to confront the witness against him in a face-to-face, adversarial proceeding, at the time the damaging statement is made, is destroyed. Instead, the accused is placed in the untenable position of cross-examining a now friendly witness regarding testimony given at a time when the witness was hostile. Instead of trying to impeach the witness's present testimony, the accused must, instead, attempt to mitigate the impact of the witness's prior statement, while at the same time trying to make the witness's present testimony appear credible. The near-impossibility of this undertaking has been recognized by the Michigan Supreme Court:

> "No matter how deadly the thrust of the cross-examiner, the ghost of the prior state-ment stands.

> His questions will always sound like attempts to permit the witness to explain why [she] changed [her] story before coming to court, with the jury being left to infer that [she] might have been induced to change [her] story in the intervening months or years, for some unrevealed and sinister reason."

Ruhala v. Roby, supra, 379 Mich. at 128, 150 N.W.2d at 158.

An additional problem created by allowing prior inconsistent statements to be used as substantive evidence is that the jurors are unable to adequately assess the witness's credibility by observing her demeanor at the time the prior statement was given. Instead, they must rely on the reading of a cold written record. That is simply not sufficient. As noted by Judge Learned Hand, "the bearing and delivery of a witness will usually be the dominating factors" in determining the witness's credibility. NLRB v. Universal Camera Corp., 190 F.2d 429, 430

(2d Cir. 1951).

The perjury question is also very troubling. If a witness testifies that a traffic light was red and then testifies that it was green, what probative effect should the law give to that witness's testimony? In mathematics when you add +1 and -1, the answer is 0. How can a nullity add any weight on the "guilty" side of the scales of justice? While we are not dealing with mathematics, I am nevertheless concerned that this kind of self-contradictory testimony can be used to overcome the presumption of innocence.

For the foregoing reasons, I must dissent.

Jones and Adams, JJ., concur.

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

RE: 89-1314

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: John Edward Hooper

vs.

State)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Application for rehearing overruled. No opinion written on rehearing.

Maddox, J. - Hornsby, CJ., Shores, Houston, Steagall and Ingram, JJ., concur; Adams, J., dissents.

02/08/91

Robert G. Esdale, Clerk
Supreme Court of Alabama

SUPREME COURT OF THE
UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC

RE: 90-1742

John Edward Hooper
v.
State of Alabama

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

6/24/91

William K. Suter, Clerk
Supreme Court of
United States

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THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF
CRIMINAL APPEALS

OCTOBER TERM 1990-91

3 DIV 91

John Edward Hooper

v.

State

Appeal from Escambia Circuit Court
CC-85-62

AFTER REMAND BY ALABAMA SUPREME COURT

BOWEN, JUDGE

John Edward Hooper was convicted of two counts of second degree rape and was sentenced to five years' imprisonment on each conviction. On original submission of this appeal, this Court reversed those convictions, addressing only two of the nine issues raised. Hooper v. State, [Ms. 3 Div. 91, March 30, 1990]

____So.2d____ (Ala.Cr.App. 1990). Our decision was reversed by the Alabama Supreme Court. Hooper v. State, [Ms. 89-1314], December 14, 1990] ____So.2d____ (Ala. 1990). In this opinion on remand from the Alabama Supreme Court, we now address all of the issues raised by the appellant on original submission.

I.

In Hooper v. State, [Ms. 89-1314, December 14, 1990] ____So.2d____, ____ (Ala. 1990), the Alabama Supreme Court "changed [the] rule" in this state and held "that a prior inconsistent statement of a witness who takes the stand and is available for cross-examination may be used as substantive evidence if the prior statement was given under oath subject to the penalty of perjury at a trial, hearing, or other

proceeding, or in a deposition."

Therefore, the trial court did not err in instructing the jury that the testimony of the prosecutrix given at the prior trial of the appellant for this same offense could be considered as substantive evidence.

II.

Our finding, on initial submission, that the evidence was insufficient to sustain the appellant's conviction was based on our application of existing law. We held that "the only evidence incriminating Hooper was the prosecutrix's prior inconsistent testimony and her prior inconsistent statements made to a school counselor, a social worker, and three of her friends." Hooper v. State, [Ms. 3 Div. 91, March 30, 1990] ____So.2d____, ____ (Ala.Cr.App. 1990) (emphasis omitted).

On certiorari review, the Alabama Supreme Court "changed the rule" so that the prosecutrix's prior inconsistent testimony given at the appellant's first trial was admissible as substantive evidence.

At the first trial, the prosecutrix testified that the appellant had sexual intercourse with her when she was 13 years old and that those acts occurred in Escambia County. This prior testimony was admitted into evidence at the appellant's second trial. A conviction for rape may be had on the uncorroborated testimony of the prosecutrix. Boddie v. State, 52 Ala. 395, 398-99 (1875). Therefore, the appellant's conviction is supported by the evidence.

III.

The appellant contends that the trial

court abused its discretion in calling the prosecutrix as the court's witness.

Prior to the second trial, the prosecution moved to have the prosecutrix declared hostile and called as a court witness due to the fact that she had recanted her prior testimony incriminating the appellant. The trial court granted that motion and called the prosecutrix as a court witness.

At trial, the prosecutrix was the first witness. She was called by the trial court and the trial judge briefly examined the prosecutrix regarding her name, age, her date of birth, the age of the appellant (which the prosecutrix did not know), and her denial that the appellant engaged in sexual intercourse with her. The prosecutor was then allowed to cross-examine the prosecutrix.

A trial court, in the exercise of its sound discretion, and being careful to maintain an attitude of impartiality, may call a witness as a court witness, may examine such witness, and may permit that witness to be cross-examined by both the prosecution and the defense. Kissic v. State, 266 Ala. 71, 74-75, 94 So.2d 202, 205 (1957).]

Here, the trial court specifically stated:

> "The court is going to make every effort to ensure that the jury understands that they are not to give any more credence to that witness [the prosecutrix] or take any significance from the fact that the court calls her as a witness in this case. I'm going to do everything I can to prevent them from thinking that I am an arm of the prosecution or the Attorney General's office or any other agency. I want to do everything I can to make [and] maintain a neutral position as best I can and to somehow try to see that whatever evidence needs to come out

to get to the truth of
the matter comes out. That's
the only purpose of this
court is to see that the
truth is brought out."

The record contains no indication that the trial court did not maintain an attitude and demeanor of impartiality. The record furnishes no reason to believe that the trial court abused its discretion. See Wade v. State, 50 Ala. 164, 166 (1874).

State's witnesses S.M. and M.L. were friends of the prosecutrix. Each testified to complaints made by the prosecutrix to them about the appellant's sexual molestation. The trial court refused to allow defense counsel to cross-examine either witness about whether she had been a victim of sexual abuse. Defense counsel made an offer of proof that each witness had been sexually abused by someone other

than the appellant, and argued that each witness was biased against the appellant for that reason. Counsel also argued that the prosecutrix made her complaints to these witnesses because they had been victims of sexual abuse. The trial court sustained the State's objection and held that "there's got to be more of a direct link to show bias toward this defendant, like something that occurred between them."

"[A] party is given wide latitude on cross-examination to test a witness's partiality, bias, or interest." Perry v. Brakefield, 534 So.2d 602, 608 (Ala. 1988). The rule in this state, notwithstanding the general principle concerning the development of the interest or bias of a witness, is that the range of cross-examination rests largely in the discretion of the trial

court and that the court's rulings will not be disturbed unless it clearly appears that the defendant was prejudiced by the rulings. However, "where the witness' testimony is important to the determination of the issues being tried, there is little, if any, discretion in the trial judge to disallow cross-examination on matters which tend to indicate the bias of the witness." Wells v. State, 292 Ala. 256, 258, 292 So.2d 471, 473 (1973).

> "It is always competent on cross-examination to make such interrogation of a witness as would tend to test his interest bias, or prejudice, or to illustrate or impeach the accuracy of his testimony. Both our appellate courts have approved the principle stated in 2 Wigmore on Evidence, 2d Ed., Section 949, p. 232: 'The range of external circumstances from which probable bias may be inferred is infinite. Too much refinement in analyzing their probable effect is out of place.' Louisville & N.R. v. Martin, 240 Ala. 124, 193 So. 141,

144; Sowell v. State, 30 Ala.App. 18, 199 So. 900. And for emphasis we repeat the oft-stated rule that the latitude and extent of such cross-examination is a matter which of necessity rests largely within the sound judicial discretion, which will not be revised on appeal except in extreme cases of abuse. Such cross-examination may even pertain to irrelevant and immaterial matters as bearing on the memory, accuracy, credibility, interest, or sincerity of the witness."

Housing Authority of City of Decatur v. Decatur Land Co., 258 Ala. 607, 612, 64 So.2d 594, 598 (1953). "'[T]he extent to which a witness may properly be cross-examined as to collateral cirmumstances for the purpose of showing bias depends in some instances upon the importance of his testimony, and especially upon whether such testimony is of a nature to be seriously affected by prejudice, bias, or hostility.'" Louisville & N.R. v. Martin, 240 Ala. 124, 131, 198 So. 141, 147 (1940)

(emphasis in original)_. "[I]t is an abuse of discretion and a violation of constitutional rights to deny to a defendant the right to cross-examine a witness at all on a 'subject matter relevant to the witness' credibility', such as the witness' possible motive for testifying falsely." United States v. Brown, 546 F.2d 166, 169 (5th Cir. 1977). See Stinson v. State, 41 Ala.App. 575, 576, 142 So.2d 897, 898, cert. stricken, 273 Ala. 479, 142 So.2d 899 (1962) (State properly allowed to cross-examine wife, who testified for defendant-husband, as to whether she had previously been convicted for same offense of which defendant stood accused.). "We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in

otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' Davis v. Alaska, [415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974)]." Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).

We find that the trial court erred, at least with regard to S.M., in not allowing defense counsel to cross-examine that witness about whether she had ever been sexually abused. The fact that a prosecution witness has been a victim of sexual abuse is a matter which may tend to bias that witness against a defendant charged with the rape of his

daughter. We find this conclusion inescapable in light of the fact that two veniremembers were excused for cause based on their admitted prejudice caused by the fact that one veniremember had been raped and the minor daughter of another member had been raped.

In qualifying the jury venire, the trial court asked, "Have you been or has any member of your family ever been the victim of rape or any sexual abuse?" Two veniremembers indicated that they had been sexually abused and that their experience either would or might influence their verdict. The trial court granted the appellant's challenge for cause, without objection from the prosecution, to these two veniremembers.

However, under the circumstances of this case, we find that that same error was harmless because the fact that the

prosecutrix made complaints to her two friends was corroborated by other witnesses, and because other witnesses testified to the fact that the prosecutrix had made complaints to them.

The prosecutrix admitted to having made complaints to T.T. and M.L., but denied ever discussing the matter with S.M. Sixteen year old T.T. testified that on several occasions, the prosecutrix told her that the appellant had sexually abused her. Mrs. Carol Middleton, a guidance counselor at the school the prosecutrix attended, testified that she talked to T.T., M.L., and the prosecutrix together in her office, and at that time, the prosecutrix stated that she had been sexually abused by the appellant. Ms. Amelia Davis, a licensed social worker, testified that the prosecutrix told her

that she had been sexually abused by the appellant. Ms. Amelia Davis, a licensed social worker, testified that the prosecutrix told her that she had been sexually abused by the appellant. Ms. Davis also testified that the prosecutrix told her that she had told S.M., M.L., and T.T. that she had been sexually abused by the appellant. Clinical psychologist, James F. Chudy, testified that the prosecutrix told him that she had been sexually abused by the appellant. Dr. Jimmy Adkisson, a physician who examined the prosecutrix, testified that the prosecutrix gave him a history of sexual abuse.

Furthermore, a close reading of the trial testimony of S.M. reveals that she indicated that she had been sexually abused. Although the trial court sustained the State's objection, Ms. M.

did testify that it was not the appellant that molested her. In addition, the prosecutrix testified on cross-examination by defense counsel, that Ms. M. told her that she had been sexually abused by her uncle.

The prosecutor represented to the court that M.L. denied ever being sexually abused.

Although we are extremely reluctant to hold that any improper limitation of cross-examination constitutes harmless error, we are convinced beyond any reasonable doubt that the error in this case did not contribute to the verdict of the jury. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Violations of the confrontation clause of the Sixth Amendment are subject to harmless error analysis. Delaware v. Van Arsdall, 475

U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

> "[W]e hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman [v. California, 386 U.S. 18], harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might, nonetheless, say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. Those factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."

Van Arsdall, 475 U.S. at 684, 106 S.Ct. 1438.

Here, the testimony of S.M. and M.L. was not that significant in consideration of the fact that other witnesses testified that the prosecutrix had told them that she had been sexually abused by the appellant, and the fact that the prosecutrix did complain to both witnesses was corroborated by other witnesses. Other than with regard to the past sexual abuse, defense counsel was allowed a thorough and sifting cross-examination of witnesses, S.M. and M.L. Finally, despite the fact that the prosecutrix recanted her prior testimony incriminating the appellant, the strength of the State's case is impressive.

For these reasons, we find that the improper infringement of the appellant's right of cross-examination constitutes harmless error.

V.

On cross-examination of the prosecutrix, who was called as the court's witness, the State elicited her prior testimony that, when she was 13 years old, the appellant had sexual intercourse with her on September 6, 1984, and December 13, 1984, the dates specifically averred in the indictment. In addition, the prosecutor elicited the prosecutrix's prior testimony that the appellant had been sexually abusing her since she was "[a]bout five. Between five and seven [years old]" when the appellant "put his hands on the private parts of [her] body." The prosecutrix also testified that "[a]bout seven he started trying . . . to penetrate me but until I was nine, he couldn't." She stated that after the age of nine, the appellant had sexual intercourse with

her "about every week," and when she was 12 or 13 "it increased more." She stated that at the time of those two incidents she was 13 years old. The appellant argues that this additional testimony constitutes inadmissable evidence of collateral criminal acts not charged in the indictment.

We hold that this testimony of the prior sexual misconduct between the appellant and the prosecutrix was properly admitted into evidence.

> "[W]here . . . a defendant is charged with the first degree rape of his minor daughter, evidence establishing that he had raped and/or committed acts of sexual abuse toward her prior to or subsequent to the offense for which he is charged, is admissible to prove his motive in committing the charged offense. Such evidence tends to establish the inducement (i.e., unnatural sexual passion for his child) that led him to rape or molest her."

Bowden v. State, 538 So.2d 1226, 1235 (Ala. 1988) (emphasis in original).

VI.

The appellant was first tried and convicted in September, 1985. That conviction was reversed because of the prosecutor's improper cross-examination of character witnesses for the appellant. Hooper v. State, 523 So.2d 469 (Ala.Cr.App. 1986). The appellant was retried and convicted in September of 1988. The appellant argues that, at his second trial, the trial court erred in allowing the prosecution to impeach the prosecutrix with her prior inconsistent answer to the question, "Have you ever had oral sex with your father?" without establishing a proper predicate.

At the second trial, on cross-examination of the prosecutrix by the prosecutor, the following occurred, and,

for the first time during the course of the trial, defense counsel objected on the ground of improper predicate for impeachment:

> Q. Now, let me ask you this, K____, today. You don't have to look at the record. Have you ever had oral sex with your father?
>
> A. No, sir.
>
> Q. Look at page R-82 of the record [of her testimony at the first trial]. Mr. Rebarchek [the prosecutor at the first trial] says, --
>
> MR. HARDEN [defense counsel]: Judge, I'm going to object. He's not laying the proper predicate to elicit prior inconsistent statements.
>
> THE COURT: You want to elaborate?
>
> MR. HARDEN: Yes, sir.
> There's a certain procedure that Mr. Valeska [the district attorney] has got to go through in order to elicit -- He cannot just start reading from the transcript. He's been doing that throughout this trial, Judge.
>
> MR. VALESKA: I asked her about it, if she ever had oral sex with him. She answered, not from the transcript, she

answered no. Then I called her to the transcript.

MR. HARDEN: It's not proper. It's not a proper foundation laid for eliciting impeachment testimony from a prior inconsistent statement.

THE COURT: I overrule the objection.

MR. HARDEN: We except.

MR. VALESKA: Go to page R-82, K___.

A. Yes, sir.

Q. Question: 'When did you see that?'

A. 'When he had oral sex with me.'

Q. Question: 'Could you describe it for us, please?'

A. 'White syrupy liquid that came out of his penis.'

Q. MR. VALESKA: Question: 'Did you ever get any of that on you?'

MR. HARDEN: We are going to move for a mistrial on the grounds that he has elicited testimony of an impeachment nature without laying proper predicate for impeachment. It's prejudicial. It has come in over proper objection. We move for a mistrial.

THE COURT: Okay. Would counsel approach the bench.

Immediately after this exchange, the

trial recessed for lunch. Upon return, the trial court stated:

> "The defense prior to breaking for the noon hour made an objection which the court did not rule upon. The court has considered it during the noon hour. The court is going to sustain the objection as made by the defense regarding the method of impeaching this witness."

"To impeach a witness with prior inconsistent statement, counsel must ask [the witness] specifically aobut the statement at issue, with reference to the time and place at which he allegedly made it and the person to whom it was made, and give [the witness] an opportunity to admit or to deny having made it." Perry v. Brakefield, 534 So.2d 602, 606 (Ala. 1988); accord, C. Gamble, McElroy's Alabama Evidence Section 157.01 (3d ed. 1977). However, "perfect precision in the predicate question with respect either to the

content of the supposed statement, the time when, the place where, or the person to whom made [is not required]. The rule is not ironclad and perfection is not required." McElroy's Section 157.01(3) (footnotes omitted).

While the district attorney did not establish the predicate he should have established before impeaching the prosecutrix with her prior testimony, we consider that error harmless under the facts of this case. Everyone, including the prosecutrix, understood that the district attorney was using the prior testimony given by the prosecutrix to impeach her testimony. It was undisputed, even before the prosecutrix took the witness stand, that she was going to recant her prior testimony and deny that the appellant had ever sexually abused her. At the very

beginning of his cross-examination of the prosecutrix, the district attorney established that she remembered testifying under oath "in this courtroom back in 1985." The district attorney handed the prosecutrix "a copy of your testimony back in 1985" and asked her to "take a minute and look at it." Then the district attorney cross-examined the prosecutrix for 60 pages in the transcript before defense counsel objected on the ground that there was no proper predicate being laid. While these facts do not justify the prosecutor's disregard of the rule requiring a proper predicate for impeachment, it certainly renders that error harmless in this case. A consideration of the reason for the rule reveals that there was no unfairness to the prosecutrix-witness in this case.

"The basic reason for the requirement that the predicate question specify time, place, content of the supposed statement, and the person to whom made, is to enable the faculties of the mind of the witness to be put in motion and his memory aided by the train of ideas which such circumstances would be likely to suggest with reference to the subject matter under inquiry and thereby be aided in recalling to memory whether he had made the statement; and, if he recalls making it, to give his explanation of the apparent conflict between his testimony and such prior statement." McElroy's Section 157.01(2).

VII.

The appellant argues that he was prejudiced by the admission of three XXX-rated video tapes, which were admitted for identification purposes only, where the State failed to show that the contents of the tapes were in substantially the same condition as at the time they were viewed by the appellant and the prosecutrix, and where the State failed to establish a proper

and continuous chain of custody of the video tapes.

The prosecutor elicited the prosecutrix's prior testimony that she had watched X-rated films depicting "very, very explicit sex"; that she watched these films with the appellant in the appellant's bedroom; that the appellant told her that if she ever ran away, she would have to do things like those that appeared in one of the films about a girl who ran away and was raped; and that after they watched the films, she and the appellant "usually had sex."

State's exhibits 1A and 1B, 2A and 2B, and 3A and 3B are the video tape containers and the actual pornographic video tapes. At trial, the prosecutrix admitted that she had watched videos 2B and 3B by herself, and the prosecutor elicited her prior testimony that she

had watched the three videos with her father. The prosecutor also elicited the prosecutrix's prior testimony that the appellant told her the videos came from Don Champion who put in their satellite dish.

State's witness Donald Champion identified the three videos as being ones he had owned. He testified that he had watched "parts" of each tape. To the best of his memory, he lent tape 1B to the appellant, and testified that it was "very possible" he had lent tape 2B to the appellant, although he was not certain. He testified that he did lend three X-rated tapes to the appellant while he was a state trooper in Evergreen, around the time he sold a satellite system to the appellant in March, 1984. As best Champion could remember, those three tapes were among

the seven or eight tapes he gave to Alabama State Trooper Captain L. N. Hagan. He did not know if the appellant made any changes or alterations to the tapes.

Captain Hagan testified that he obtained seven video tapes from Champion in January 1985, and that the three videos marked for identification at trial contained material which the prosecutrix had described to him as having seen on videos at her house with the appellant.

The appellant testified in his own defense at trial. He admitted that he got three video tape recordings from Chapman and that he took them to his residence. However, he testified that he watched only about 15 or 20 minutes of one tape before he discovered the pornographic nature of the tapes, that

he did not view any tape with his daughter, the prosecutrix, and that he returned the tapes to Chapman.

Although marked for identification, the video tapes and their containers were never admitted into evidence. Although several witnesses described the contents of various limited portions of the tapes, the contents of those tapes were not viewed by the jury.

"'[A] proper foundation laid for the accuracy of what the [video tape] portrays obviates the need to establish a chain of custody to demonstrate its authenticity.'" Molina v. State, 533 So.2d 701, 712 (Ala.Cr.App.1988), cert. denied, 489 U.S. 1086, 109 S.Ct. 1547, 103 L.Ed.2d 851 (1989). Since the contents of the video tapes were not observed by the jury and the video tapes themselves were not introduced into

evidence, the error in the failure of the prosecution to lay a proper predicate for the admission of those tapes does not constitute a ground for reversal of his conviction.

VIII.

The appellant argues that he was denied a fair trial because of the admission of the evidence of the pornographic video tape recordings.

In a single indictment the appellant was charged with two counts of the second degree rape of his daughter. Count One charged that the sexual intercourse occurred "on or about September 7, 1984." Count Two charged that the sexual intercourse occurred "on or about December 13, 1984." In Part V of this opinion, this Court upholds the admissibility of the prior testimony of the prosecutrix that the appellant had

sexually abused her since she was five years old and had had sexual intercourse with her since she was nine years old.

The prosecutor elicited the former testimony of the prosecutrix that "sometime" during the summer of 1984 she and the appellant watched the pornographic video films in the bedroom of her parents' residence in Atmore, Alabama. According to the prosecutrix's prior testimony, the appellant told her that "if [she] ever run away there was a film about a girl who run away. He told [her that she would] have to do things like that. * * * These men were making her have sex with them." According to the prosecutrix, these films portrayed "very, very explicit sex. * * * Just mostly that people were having sex, really. * * * The girl that ran away and the men had picked her up

off the street and took her and made her have sex with them. And one of them was a real short guy who was having sex with this lady. And one of them was like a TV show, were on TV or something." In one of the films, a man in a dress "put whipped cream on [a woman's] breasts and licked it off. And she put the whipped cream on his penis * * * [and] she licked the whip cream off his penis." The prosecutrix testified that after they watched these films, they "usually had sex." She stated that she and the appellant did "not very often" watch the films.

There is no doubt that the admission of the evidence that the appellant had pornographic video tape recordings in his possession was prejudicial to his case. However, that evidence was admissible and was properly presented as

a part of the State's case in chief. "If the accused's commission of another crime is admissible in a present prosecution, the State may prove in meticulous detail the manner in which the accused committed such other crime." McElroy's Section 69.02(8). In our opinion, the probative value of the evidence of the pornographic video tape recordings and the fact that they were in the appellant's possession linked the appellant to the crimes charged and outweighed the probable prejudicial impact upon the jury of those tapes.

IX.

The appellant complains that the prosecutor cross-examined the prosecutrix in such a manner as to imply the existence of a factual predicate which was not supported by the evidence.

From the record:

Q. [prosecutor] Approximately in February of 1986, did you have a phone conversation with your father when Lynn Manz was present or listening in?

A. [prosecutrix] No, sir.

Q. All right. In that conversation in approximately February, 1986, with Lynn Manz listening either on the intercom, which you punched in yourself for them to hear it, or her listening on another phone, did you say to your father these words or these words in substance: "Daddy why did you do that"; and his response to you was: "K_____, you made me do it. You wanted it as much as I did."

A. No, sir.

MR. HARDEN: Judge, if it please the Court, I am going to object unless he lays the proper foundation to show whether she had knowledge whether somebody was listening in.

MR. VALESKA: We are going to call those witnesses. I just had to lay the predicate.

MR. HARDEN: We object to this witness testifying.

THE COURT: I overrule the objection. I believe she has already answered.

MR. HARDEN: We except.

The prosecutor did not pursue this

line of cross-examination with the prosecutrix. However, Lynn Manz was not called as a witness and did not testify at the appellant's trial.

Initially, we note, as did the trial court, that defense counsel made his objection only after the prosecutrix had answered the question. "[O]bjection to a question must be made as soon as a question is stated, unless its inadmissibility is due not to the subject of the question but something contained in the answer." Willingham v. State, 261 Ala. 454, 458, 74 So.2d 241, 244 (1954).

"'"It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner knows he cannot support by the evidence."'" Gillespie v. State, 549 So.2d 640, 644 (Ala.Cr.App. 1989);

(Ala.Cr.App. 1989); accord, Wysinger v. State, 448 So.2d 435, 438 (Ala.Cr.App. 1983). "Where the prosecutor insinuates the existence of a fact which the witness denies, the prosecution 'may have a duty to complete its impeachment of the witness or show that the prosecutor had "evidence of or reasonable ground to believe the truth of its implication."'" Gillespie, 549 So.2d at 647. Df. Ex parte Peagler, 516 So.2d 1369, 1371 (Ala. 1987) ("'When a witness denies that he has been convicted of the crime, it becomes incumbent upon the impeaching party to prove the conviction.'")

To the extent to which this was an attempt by the prosecutor to get before the jury evidence for which he had no basis, it must be condemned. However, there appears to have been some basis at

least for a similar statement. Prosecution witness Sally E."Betsy" Aust testified that she was employed as a house parent of a residential mental health care facility called Turning Point. On January 22, 1986, she overheard a telephone conversation between the appellant and the prosecutrix. She testified:

> "To the best of my memory [the prosecutrix] said, 'You realize why I can't go home.' She hit the [microphone] button and his voice came over saying, 'I said I wouldn't do that again.' And she hit the mike button off and replied again, 'You've said that before.' That's the best of my memory what."

Ms. Aust testifed that she thought there was another staff person present who overheard this conversation but she could not identify that person. The prosecutor elicited the prior testimony of the prosecutrix that her "parents had

made me feel that it was my fault that all this had happened."

Furthermore, in our review of the record we have not found that the specific objection to the prosecutor's question now raised on appeal was presented to the trial court. "The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial." Ex parte Frith, 526 So.2d 880, 882 (Ala. 1987).

At the time the prosecutor asked the question, the trial court acted within its discretion in overruling defense counsel's objection:

> "When the admissibility of a particular item of evidence hinges upon proof of other facts, the court may, in its discretion, allow the evidence upon the proponent's promise to 'connect it up.' C. Gamble, McElroy's Alabama Evidence

> Section 13.01 (3d ed. 1977). If the promised proof is not later presented, however, the party objecting to the introduction of the evidence should move for its exclusion. Henry v. Frochlichstein, 149 Ala. 330, 43 So. 126 (1907); E. Cleary, McCormick on Evidence Section 58 (2d ed. 1972)." Donahoo v. State, 505 So.2d 1067, 1072 (Ala. Cr.App. 1986).

Here, defense counsel never objected on the ground that the prosecutor could not prove or had no factual basis for his question. Although the prosecutor stated that he was "going to call those witnesses," defense counsel never moved to have the testimony of the prosecutrix stricken.

Therefore, this specific issue was not preserved for review on appeal.

The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges concur.

flatly denied that Hooper had committed the acts with which he was charged. Hooper then made a motion for judgment of acquittal, which was denied. The State was thereafter permitted to cross-examine the prosecutrix with respect to her testimony at the first trial. In this manner the State elicited that the prosecutrix had previously testified that Hooper did engage in sexual intercourse with her on the dates alleged in the indictment. The State also elicited the prosecutrix's testimony from the first trial concerning the details of these acts and other sexual acts between her and Hooper.

At the second trial, a school counselor, a social worker, and three friends of the prosecutrix testified that the prose-cutrix had told them that Hooper had engaged in sexual intercourse with her. A clinical psychologist, who had interviewed the prosecutrix only once, was called by the State and testified that the

prosecutrix exhibited characteristics of a sexually abused child. There was no eyewitness testimony and the medical evidence indicated only that the prosecutrix's physical condition was consistent with having engaged in sexual intercourse.[2] At the second trial, the only evidence incriminating Hooper was the prosecutrix's prior inconsistent testimony and her prior inconsistent state-ments made to the counselor, the social worker and the three friends.

Hooper's renewed motion for judgment of acquittal, made after the prosecution rested, was denied by the trial court. In his defense, Hooper denied raping or other-wise sexually molesting his daughter.

I

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[2] The prosecutrix testified at the second trial that, prior to 1985, she had had sexual intercourse three or four times with one of her brother's friends. This friend was called as a prosecution witness and denied having ever engaged in sexual intercourse with the prosecutrix.